Supreme Court, U.S.
FILED
OCT 15 1992
OFFICE OF THE CLERK

(4)

No. 92-393

In The

Supreme Court of the United States

October Term, 1992

MARIA DEL ROSARIO C. FRAIRE, Individually and as Next Friend for MYRA FRAIRE and JUAN ANTONIO FRAIRE, Minor Children, and JOSEFA ESQUIVEL FRAIRE,

Petitioners,

v.

CITY OF ARLINGTON and JAMES W. LOWERY, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT JAMES W. LOWERY, JR.

GARY D. EISENSTAT
Counsel for Respondent James W. Lowery, Jr.

FIGARI & DAVENPORT, L.L.P.
4800 NationsBank Plaza
901 Main Street
Dallas, TX 75202
(214) 939-2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a conflict exists among the circuit courts regarding a police officer's right to invoke the defense of qualified immunity to an excessive-force claim brought under the Fourth Amendment.

2. Whether the Court should overrule last term's decision of *Hunter v. Bryant*, ___ U.S. ___, 112 S. Ct. 534 (1991), and over twenty years of related jurisprudence and abolish the qualified-immunity defense in the context of excessive-force claims brought under the Fourth Amendment.

3. Whether Petitioners have waived their right to challenge the availability of the qualified-immunity defense to an excessive-force claim under the Fourth Amendment.

4. Whether Lowery's use of deadly force to preserve his own life and the safety of innocent bystanders constituted an unreasonable use of force under the Fourth Amendment.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

FOREWORD vii

STATEMENT OF THE CASE 2

A. Fraire Knew Lowery Was a Police Officer.. 2

B. Lowery Shot Fraire in Self-Defense 5

REASONS FOR DENYING THE PETITION FOR WRIT 7

I. The Court Should Deny the Petition Because No Conflict Exists Among the Circuit Courts Regarding the Qualified-Immunity Defense in the Context of an Excessive-Force Claim Under the Fourth Amendment 7

A. No Conflict Exists Among the Circuits Regarding Whether Qualified Immunity Is a Viable Defense to an Excessive-Force Claim Under the Fourth Amendment.... 8

1. A Survey of the Circuits 8

2. Petitioners Confuse the Availability of Qualified Immunity With Its Applicability Under Certain Circumstances 11

B. No Conflict Exists Among the Circuits Regarding an Officer's Right to Use Deadly Force in the Face of a Threat to His Own Life or the Safety of Others..... 14

1. The Sixth Circuit's View 15

2. The Seventh Circuit's View 17

TABLE OF CONTENTS – Continued

Page

II. Any Alleged Conflict That Exists Among the Circuits Is Resolved by *Siegert v. Gilley* and *Hunter v. Bryant* 18

A. The Analysis in *Siegert*—Whether a Constitutionally Protected Right Exists 19

B. The Analysis Under *Hunter*—Whether the Officer's Actions Were Reasonable in Light of Clearly Established Law at the Time .. 19

C. The Qualified-Immunity Analysis—As Applied to Excessive-Force Claims 20

III. The Court Should Not Destroy the Defense of Qualified Immunity for Law Enforcement Officers 21

IV. The Court Should Deny the Petition Because Petitioners Did Not Present or Argue the Issue of Qualified Immunity Before the Fifth Circuit and Have Therefore Waived Their Right to Challenge That Point on Appeal 23

V. The Court Should Deny the Petition Because Lowery Acted in Self-Defense and Therefore Did Not Use Excessive Force Under the Fourth Amendment 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Brown v. Glossip, 878 F.2d 871 (5th Cir. 1989) 7

Chathas v. Smith, 884 F.2d 980 (7th Cir. 1989), *cert. denied*, 493 U.S. 1095 (1990) 10

Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991), *petition for cert. filed*, 61 U.S.L.W. 3062 (U.S. July 1, 1992) 13

Dean v. City of Worcester, 924 F.2d 364 (1st Cir. 1991) 8

Dixon v. Richer, 922 F.2d 1456 (10th Cir. 1991) 12

Finnegan v. Fountain, 915 F.2d 817 (2d Cir. 1990) 8, 9

Fitzgerald v. Patrick, 927 F.2d 1037 (8th Cir. 1991) 10

Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992) 1, 2, 3, 5, 15

Gooden v. Howard County, Maryland, 954 F.2d 960 (4th Cir. 1992) 23

Graham v. Connor, 490 U.S. 386 (1989) ..... *passim*

Hamm v. Powell, 874 F.2d 766 (11th Cir. 1989) 11

Hannula v. City of Lakewood, 907 F.2d 129 (10th Cir. 1990) 10

Holt v. Artis, 843 F.2d 242 (6th Cir. 1988) 9

Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992) 10

Hunter v. Bryant, ___ U.S. ___, 112 S. Ct. 534 (1991) ..... ii, 18, 19, 20, 21, 22

Hunter v. District of Columbia, 943 F.2d 69 (D.C. Cir. 1991) 11

TABLE OF AUTHORITIES – Continued

Page(s)

Jackson v. Hoylman, 933 F.2d 401 (6th Cir. 1991)..... 12

Klein v. Ryan, 847 F.2d 368 (7th Cir. 1988)... 10, 17, 18, 28

Mitchell v. Forsyth, 472 U.S. 511 (1985) 22

Parrish v. State, 647 S.W.2d 8 (Tex. App.—Houston [14th Dist.] 1982, no writ) 27

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)..... 24

Reese v. Anderson, 926 F.2d 494 (5th Cir. 1991). 9, 18, 28

Shillingford v. Holmes, 634 F.2d 263 (5th Cir. Unit A Jan. 1981) 14, 20

Siegert v. Gilley, ___ U.S. ___, 111 S. Ct. 1789 (1991) 18, 19, 20

Slattery v. Rizzo, 939 F.2d 213 (4th Cir. 1991) ... 8, 9, 22

Smith v. Freland, 954 F.2d 343 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1954 (1992) 9, 10, 15, 16, 27, 28

Street v. Parhem, 929 F.2d 537 (10th Cir. 1991) 13

Tennessee v. Garner, 471 U.S. 1 (1985)..... 15, 16, 24, 26

Thorsted v. Kelly, 858 F.2d 571 (9th Cir. 1988)..... 10

United States v. Sanchez, 914 F.2d 1355 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1626 (1991) 27

Wyatt v. Cole, ___ U.S. ___, 112 S. Ct. 1827 (1992) .21, 22

Young v. City of Killeen, 775 F.2d 1349 (5th Cir. 1985).....9, 18, 28

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES

28 U.S.C. § 1295 11

42 U.S.C. § 1983 ..... 2, 16, 17

FED. R. CIV. P. 56 ..... 12, 21

TEX. PENAL CODE ANN. § 1.07(a)(11)(B) (Vernon 1974) 26

TEX. PENAL CODE ANN. § 9.51(a) (Vernon 1974) 28

TEX. PENAL CODE ANN. § 9.51(c) (Vernon 1974) 27, 28

FOREWORD

Citations to the Record on Appeal before the Fifth Circuit will be referred to as "R." followed by the volume and page number to which reference is made.

Unless otherwise indicated, all emphases are supplied by counsel.

No. 92-393

In The

Supreme Court of the United States

October Term, 1992

MARIA DEL ROSARIO C. FRAIRE, Individually and as Next Friend for MYRA FRAIRE and JUAN ANTONIO FRAIRE, Minor Children, and JOSEFA ESQUIVEL FRAIRE,

Petitioners,

v.

CITY OF ARLINGTON and JAMES W. LOWERY, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT JAMES W. LOWERY, JR.

Respondent James W. Lowery, Jr. ("Lowery") requests that this Court deny the Petition for Writ of Certiorari ("Petition") of Maria del Rosario C. Fraire, Individually and as Next Friend for Myra Fraire and Juan Antonio Fraire, minor children, and Josefa Esquivel Fraire (collectively, "Petitioners") seeking review of the Fifth Circuit's opinion in this case reported at 957 F.2d 1268 (5th Cir. 1992).

STATEMENT OF THE CASE

This is an action for damages under 42 U.S.C. section 1983 brought by Petitioners, the survivors of Javier Fraire ("Fraire"), against the City of Arlington, Texas ("City"), and Lowery, a police officer for the City, for alleged use of excessive force. Petitioners' claims arise out of an incident that occurred on November 22, 1987, in which Lowery shot Fraire in self-defense, and not--as Petitioners allege--simply for driving while intoxicated.

For purposes of brevity, and to avoid any inference under Supreme Court Rule 15.1 that Lowery accepts Petitioners' statement of the case as true, Lowery directs the Court to the Fifth Circuit's detailed recitation of the facts as stated in its published opinion. *Fraire v. City of Arlington*, 957 F.2d 1268, 1272 (5th Cir. 1992). Additionally, because Petitioners' statement of the case omits certain crucial facts and blatantly distorts others, a brief discussion of two key points is necessary.

A. Fraire Knew Lowery Was a Police Officer.

Although the record is replete with evidence to the contrary, Petitioners allege that Lowery never properly identified himself to Fraire as a law enforcement officer. Therefore, since Lowery was dressed in plain clothes, Petitioners suggest that Fraire did not know that Lowery was a police officer. Apparently, Petitioners believe that this "fact" somehow justifies Fraire's refusal to follow Lowery's repeated demands to stop his truck. However, as the district court correctly held, "[t]here is no genuine dispute that Fraire knew Lowery was a law enforcement officer for a period of time before he made his fatal

decision to drive his pickup toward Lowery." (R. Vol. II, p. 537 (footnote omitted).) This finding is well supported by the record.

First, when Fraire turned right off of Collins Road and onto Woodbrook Street, he pulled into the driveway of the first house at the top of Woodbrook Street and stopped—hoping Lowery would then drive by. (R. Vol. III, p. 565.) Obviously, Fraire did so solely to trick Lowery because he knew Lowery was a police officer.[1]

Second, after this ploy failed, Fraire backed out of this driveway, nearly hitting Lowery. As Fraire sped down Woodbrook Street, he told his passenger, Jose Rodriguez ("Rodriguez"), that he (Fraire) had problems with a "DWI" and even asked Rodriguez to drive. (R. Vol. II, pp. 500; R. Vol. III, p. 565.) This admission further demonstrates that Fraire recognized that Lowery was a police officer who could arrest him for drinking and driving—an offense that Fraire knew was in direct violation of his probation and could land him in jail. (R. Vol. I, p. 276; R. Vol. II, pp. 500-01; R. Vol. III, p. 565.)

---

[1] Lowery testified that once Fraire stopped in the driveway, Lowery approached the truck and identified himself as a police officer, both orally and with his badge. When Lowery was standing at the passenger's side of the truck, he again identified himself as a police officer and observed Fraire take an open beer can and place it on the floor. Lowery identified himself for a third time as a police officer and told Fraire to put the truck in park and turn off the ignition. In response, Fraire admitted, "I am sorry, I didn't mean to do it. It won't happen again, I promise." When Lowery repeated his request for Fraire to put the truck in park and turn off the ignition, Fraire instead put the truck in reverse and backed out of the driveway. 957 F.2d at 1270.

Third, when Fraire reached the end of Woodbrook Street, he crashed his truck several feet up onto a neighbor's lawn in his effort to flee from Lowery. Fraire then instructed Rodriguez to throw the open beer cans out the window of the truck—a fact that Petitioners conveniently ignore. (Rodriguez told police after the shooting, "I also recall that he [Fraire] was scared and told me to throw a beer away.") (R. Vol. II, p. 501; Vol. III, p. 569.)

Fourth, Lowery testified in his affidavit--without contradiction--that he identified himself to Fraire on numerous occasions as a police officer. Specifically (and even ignoring Lowery's first encounter and discussion with Fraire at the top of Woodbrook Street), when Lowery entered Creekmere Court, the cul-de-sac where Fraire had finally stopped, Lowery exited his car, removed his badge, and displayed it to Fraire and Rodriguez. (R. Vol. I, p. 282.) Additionally, and notwithstanding Petitioners' outrageous allegations to the contrary, Lowery also repeatedly identified himself verbally as a police officer. As the Fifth Circuit held and the record shows, this fact is confirmed by almost every witness who gave a statement to the police after the shooting. 957 F.2d at 1271-72, 1274. (R. Vol. I, pp. 274, 282, 278-79; R. Vol. III, pp. 596, 598, 602, 607.)[2]

Finally, Rodriguez told the police in his interview immediately after the shooting that Fraire *knew* Lowery was a police officer:

---

[2] Even Rodriguez does not deny that Lowery identified himself as a police officer, and admits in his affidavit that he heard Lowery yell "Stop!" (R. Vol. III, p. 558.)

> Q. I know we talked about this before . . . How did Javier know that he [Lowery] was a police officer. The way he was dressed? How did Javier know?
>
> A. I really don't know maybe because of the vehicle.

(R. Vol. III, p. 570.)

Obviously then, Petitioners' assertion that Lowery "never displayed any identification or properly identified his status as a law enforcement officer with [the City]" is, bluntly stated, false. (Petition at 3.)

B. Lowery Shot Fraire in Self-Defense.

Petitioners also allege that Lowery did not shoot Fraire in self-defense. Not surprisingly, the Fifth Circuit disagreed, holding: "Although all of the final action occurred in a matter of seconds, there can be no doubt that Lowery's act was one of virtual instinctive self-preservation in no way related to his original concerns with the open container laws, a concern by then long since evaporated." 957 F.2d 1275.[3] This statement is also well supported by the record.

---

[3] The trial court reached a similar conclusion: "When . . . Lowery's physical safety became imperiled, his response by gunfire could be thought by a reasonable officer to be an appropriate and reasonable one. Obviously, no reasonable officer would intentionally kill an intoxicated driver just to put an end to his drunken journey. This case is not so simple." (R. Vol. II, pp. 537-38.)

Lowery testified—again without contradiction—that he "feared for his life" as Fraire headed toward him in the truck. (R. Vol. I, pp. 278-79.) This fear was justified based upon Fraire's prior actions of speeding down Woodbrook Street, stopping only when he crashed the truck against the curb onto a neighbor's yard, then backing up, nearly ramming Lowery's car, speeding off again, and then driving directly at Lowery when he was on foot. (R. Vol. I, pp. 276-77, 282, 278-80.) As one eyewitness recalled:

> The truck was heading right toward the detective and it looked like the driver of the truck was trying to run over the detective with the truck. I saw the detective holding a handgun with both hands out in front of him. I heard the detective shout "hault" [sic]. . . . The detective didn't shoot at first. He stood there for a while with his gun pointed at the truck while the truck was still headed right for the detective at a fast speed. The truck got closer and closer to the detective and the detective shot his gun one time at the truck when the truck was about ten or fifteen feet away from the detective. The truck was going to run right over the detective if the detective didn't do something and I don't know if the detective would have had time to even jump out of the way or not because the truck was going so fast and was so close to hitting the detective.

(R. Vol. III, p. 601.) When asked immediately afterwards if he thought Fraire was going to hit or run over Lowery, even Rodriguez conceded that "it was close." (R. Vol. III, p. 568.) Therefore, when Fraire refused to stop or alter his path, Lowery was forced to shoot in self-defense.

With these facts in mind, the Court should deny the Petition for any of the reasons set forth below.

REASONS FOR DENYING THE PETITION FOR WRIT

I.

The Court Should Deny the Petition Because No Conflict Exists Among the Circuit Courts Regarding the Qualified-Immunity Defense in the Context of an Excessive-Force Claim Under the Fourth Amendment.

Petitioners contend that a conflict exists among the circuits regarding whether a law enforcement officer may claim qualified immunity in the context of a claim for excessive force under the Fourth Amendment, and that *Graham v. Connor*, 490 U.S. 386 (1989) did not resolve that alleged conflict. (Petition pp. 23-28.)[4] However, as the following analysis demonstrates, no conflict exists among the circuits, either generally within the area of excessive

---

[4] Petitioners state that this Court "left open" the question of whether a qualified-immunity defense is available to a law enforcement officer in the face of an excessive-force claim. More precisely, however, because qualified immunity had not been pled in *Graham*, the Court stated that it expressed no view regarding its proper application in excessive force cases arising under the Fourth Amendment. 490 U.S. at 399 n.12. However, the Court in *Graham* expressly contemplated the application of the qualified-immunity defense to excessive-force claims, holding that "the officer's *objective* 'good faith'—that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983." *Id.* (emphasis in original). *Accord Brown v. Glossip*, 878 F.2d 871, 873 n.3 (5th Cir. 1989).

force or specifically considering other cases with similar facts.

A. No Conflict Exists Among the Circuits Regarding Whether Qualified Immunity Is a Viable Defense to an Excessive-Force Claim Under the Fourth Amendment.

1. A Survey of the Circuits.

In *Dean v. City of Worcester*, 924 F.2d 364 (1st Cir. 1991), the First Circuit affirmed summary judgment in favor of two police officers based upon a qualified-immunity defense to an excessive-force claim arising out of injuries the plaintiff sustained in the course of an arrest based upon mistaken identity. Similarly, in *Finnegan v. Fountain*, 915 F.2d 817 (2d Cir. 1990), the Second Circuit held that a police officer may rely upon qualified immunity as a defense to a claim of excessive force arising in the context of effectuating an arrest.

Although the Third Circuit appears to have never addressed the issue, in *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991), retired United States Associate Supreme Court Justice Powell, sitting by designation for the Fourth Circuit, wrote that:

> There is no principled reason not to allow a defense of qualified immunity in an excessive use of force claim, when it is allowed in other actions alleging violations of the fourth amendment. The interests served by the principle of qualified immunity are present in all suits alleging violations of the fourth amendment.

Id. at 215. As a result, the Fourth Circuit held that the police officer was qualifiedly immune from an excessive-force claim brought by a suspect whom the officer had shot during an arrest.

The Fifth Circuit has obviously held in this and other cases that qualified immunity is a valid defense to an excessive-force claim. *See, e.g., Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), and *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985).

Although the Second Circuit in *Finnegan v. Fountain*[5] and the Fourth Circuit in *Slattery v. Rizzo*[6] have previously suggested that the Sixth Circuit does not recognize qualified immunity as a defense to an excessive-force claim,[7] the Sixth Circuit's subsequent decision in *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1954 (1992), discussed in detail below,

---

[5] 915 F.2d at 822.

[6] 939 F.2d at 215.

[7] This suggestion is based upon the Sixth Circuit's pre-*Graham* decision in *Holt v. Artis*, 843 F.2d 242 (6th Cir. 1988). However, *Holt* does not hold that qualified immunity is never available as a defense to an excessive-force claim; rather, it holds that under the facts of that case, the trial court should have concluded that immunity did not exist and therefore should not have presented the jury with an instruction on the good-faith issue. Moreover, even if one construes *Holt* as holding that the defense of qualified immunity is unavailable as a matter of law in excessive-force cases, the Sixth Circuit's subsequent holding in *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1954 (1992), indicates that the Sixth Circuit no longer adheres to the position stated in *Holt*, following this Court's decision in *Graham v. Connor*.

demonstrates that the Sixth Circuit does recognize qualified immunity as a defense to an excessive-force claim. Specifically, the court in *Smith* affirmed a summary judgment decision in favor of the police officer based upon the officer's assertion of qualified immunity as a defense to an excessive-force claim under the Fourth Amendment.

In *Klein v. Ryan*, 847 F.2d 368 (7th Cir. 1988), also discussed in detail below, and again in *Chathas v. Smith*, 884 F.2d 980 (7th Cir. 1989), *cert. denied*, 493 U.S. 1095 (1990), which is based upon *Graham v. Connor*, the Seventh Circuit similarly recognized that qualified immunity is a viable defense to an excessive-force claim.

Both the Eighth and Ninth Circuits have adopted this position as well. *See, e.g., Fitzgerald v. Patrick*, 927 F.2d 1037 (8th Cir. 1991) (affirming summary judgment in favor of a police officer based upon a defense of qualified immunity in the context of an excessive-force claim); *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992) ("Police officers are entitled to assert a defense of qualified immunity from section 1983 liability if they reasonably believed in good faith that their actions were constitutional."). *Accord Thorsted v. Kelly*, 858 F.2d 571 (9th Cir. 1988).

Additionally, in *Hannula v. City of Lakewood*, 907 F.2d 129 (10th Cir. 1990), the Tenth Circuit reversed a trial court's decision denying a police officer's motion for summary judgment based upon qualified immunity and ordered the trial court to enter summary judgment in favor of the officer on the basis of a qualified-immunity defense to an excessive-force claim.

Finally, both the Eleventh and the District of Columbia Circuits have held that qualified immunity is a valid defense to an excessive-force claim. *See Hamm v. Powell*, 874 F.2d 766 (11th Cir. 1989), modified and reaffirmed in light of *Graham v. Connor* at 893 F.2d 293 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 110 S. Ct. 3218 (1990); *Hunter v. District of Columbia*, 943 F.2d 69 (D.C. Cir. 1991).[8]

Therefore, as these cases demonstrate, the Court should deny the Petition because no conflict exists among the circuits regarding the availability of the qualified-immunity defense to a claim of excessive force under the Fourth Amendment. To the contrary, all circuits that have addressed the issue have found that qualified immunity is a viable defense to excessive-force claims under the Fourth Amendment.

2. Petitioners Confuse the Availability of Qualified Immunity With Its Applicability Under Certain Circumstances.

Notwithstanding all of the foregoing cases, Petitioners argue that a conflict exists among the circuits because, in certain cases, courts have not permitted defendants to succeed on their defense of qualified immunity. However, this alleged confusion results solely because of the imprecision with which Petitioners have framed the issues. Specifically, Petitioners confuse (1)

---

[8] The Federal Circuit does not appear to have even addressed the issue of qualified immunity and excessive force or rendered an opinion on the subject, which is not surprising since that court is one of limited jurisdiction. *See* 28 U.S.C. § 1295.

whether qualified immunity is available in the first instance to a defendant in the face of an excessive-force claim, with (2) whether a defendant is entitled to claim qualified immunity at a particular stage of the litigation or in light of the particular facts and circumstances of the case. The preceding survey of cases demonstrates that the answer to the first issue is in the affirmative; and the following analysis shows that, when analyzed properly, no confusion exists among the circuits with respect to the second issue.

Petitioners suggest that certain post-*Graham* cases, such as *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991) and *Jackson v. Hoylman*, 933 F.2d 401 (6th Cir. 1991), stand for the proposition that qualified immunity is no longer a viable defense to an excessive-force claim under the Fourth Amendment. Petitioners misstate the law. Although the court in *Dixon* held that the trial court correctly denied the officers' motion for summary judgment on the ground of qualified immunity because of the vastly conflicting summary judgment evidence, the court also held that its decision did not preclude the officers from reasserting their qualified-immunity defense at and after trial when the factual disputes had been resolved. 922 F.2d at 1463. In other words, *Dixon* and cases like it, such as *Jackson v. Hoylman*, only stand for the proposition that if a genuine fact issue exists, it is improper under FED. R. CIV. P. 56 to grant summary judgment. However, none of these cases hold that qualified immunity is never a viable defense to an excessive-force claim under the Fourth Amendment.

Although wholly inapplicable to this case, Petitioners correctly note that some courts have refused to allow a

qualified-immunity defense following a finding of excessive force in violation of the Fourth Amendment where the relevant law is clearly established. *See, e.g., Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991), *petition for cert. filed*, 61 U.S.L.W. 3062 (U.S. July 1, 1992) (No. 92-137); *Street v. Parhem*, 929 F.2d 537 (10th Cir. 1991). This result is logical for post-*Graham* cases because, ignoring for the moment the "clearly established law" prong of the qualified-immunity defense, some courts have concluded that the "reasonableness" prong of the qualified-immunity defense necessarily involves an inquiry into the same facts as the "reasonableness" element of a Fourth Amendment excessive-force claim under *Graham v. Connor*. Accordingly, those courts have held that a finding of unreasonable force under the Fourth Amendment necessarily addresses the reasonableness element of a post-*Graham* qualified-immunity defense and renders that defense inapplicable in such situations.

However, the Court should not and need not grant the Petition regarding this issue because cases such as *Curnow* and *Street* are consistent with the Fifth Circuit's decision in this case. As discussed below, the difference between those cases and the present action is that no genuine fact issue exists regarding the reasonableness of Lowery's actions under the circumstances. More importantly, however, no court—including the Fifth Circuit in this case—has held that a police officer's use of force was unreasonable under the Fourth Amendment, but was nonetheless reasonable for purposes of qualified immunity.[9] Certainly, Petitioners have not cited any cases

---

[9] Again, this analysis assumes that the "clearly established law" prong of the qualified immunity defense is not at issue.

reaching this conclusion. Therefore, no conflict exists among the circuits on this point.[10]

B. No Conflict Exists Among the Circuits Regarding an Officer's Right to Use Deadly Force in the Face of a Threat to His Own Life or the Safety of Others.

Additionally, when examining the Fifth Circuit's decision in light of other cases involving similar facts, it becomes even more clear that no conflict exists among the circuits regarding an officer's right to use deadly force when faced with a life-threatening situation. In this case, the Fifth Circuit correctly determined that Lowery was qualifiedly immune because he had probable cause to believe that Fraire posed a threat of serious physical harm to Lowery and others, and therefore deadly force

---

[10] Independent of the above, and even assuming such a conflict did exist, the Court should still not grant the Petition in this case because Lowery's actions occurred in November 1987 --two years before the Court's decision in *Graham*. Accordingly, the excessive-force test under the Fourth Amendment involves a legal inquiry that is appropriately different from the applicable qualified-immunity test, which examines the reasonableness of Lowery's conduct in light of clearly established law at the time, i.e., in 1987. At that time, *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. Unit A Jan. 1981), which represented the state of the law regarding excessive force, required a substantive due process analysis under the Fourteenth Amendment that also included a subjective "malice" element. Thus, even if the Court were otherwise inclined to grant the Petition, this case is inappropriate for certiorari because the Fifth Circuit was required to analyze Lowery's actions--for qualified immunity purposes--under the *Shillingford* test. Therefore, any decision by this Court regarding excessive force would be of limited precedential value.

was justified under the circumstances. 957 F.2d 1275-77. This conclusion is proper in light of the Court's holding in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), that it is not constitutionally unreasonable to use deadly force "[w]here the officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or to others." Other courts faced with similar facts and claims have reached the same result.

1. The Sixth Circuit's View.

As stated above, Petitioners and the Second and Fourth Circuits have suggested that the Sixth Circuit does not recognize qualified immunity as a defense to an excessive-force claim. However, that court's recent decision in *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), *cert. denied*, 112 S. Ct. 1954 (1992), which is remarkably similar to this case, makes it clear that the Sixth Circuit does recognize qualified immunity as a viable defense to a Fourth Amendment excessive-force claim.

In *Smith*, a police officer observed a suspect, Smith, run a stop sign—a traffic offense far less serious than Fraire's driving while intoxicated. As a result, the officer gave chase. Like Fraire did here, Smith attempted to flee, leading police on a high-speed chase reaching speeds in excess of ninety miles per hour. *Id.* at 344. At one point, Smith—like Fraire—entered a residential neighborhood and found himself on a dead-end street. As Smith attempted to turn his vehicle around, the officer exited his car and walked toward Smith's car in an attempt to arrest Smith and remove him from the vehicle. However, as the officer approached Smith's car on foot:

> Suddenly, Mr. Smith backed up his car, then sped forward and crashed into Officer Schulcz's car. He backed up again and zoomed around the police car, smashing into the fence and gate as he did so. As Mr. Smith's car drove *past*, Officer Schulcz pulled his gun and fired one shot at it. The bullet entered the passenger side of the car, pierced the passenger seat, then struck Mr. Smith in the right side, killing him.

Id. Based upon these facts, the suspect's mother brought suit against the officer, the city, and its acting police chief under 42 U.S.C. section 1983 for excessive force and for violations of the Ohio wrongful death statute. The Sixth Circuit affirmed a summary judgment in favor of the police officer based upon a defense of qualified immunity and held that the officer did not violate Smith's constitutional rights. *Id.* at 347.

The *Smith* case is significant for three reasons. First, the police officer did not shoot until *after* Smith drove by. It therefore appears that the officer did not necessarily shoot Smith to preserve his own life, as Lowery did here. Even under these circumstances, the court found that the officer's use of force was reasonable under *Tennessee v. Garner* because deadly force was required to prevent injury to others. *Id.* at 347-48. Second, the court in *Smith* held that the officer did not use excessive force, even though his actions—unlike Lowery's—were found to have violated that city's internal deadly-force policies. *Id.* Finally, last term this Court declined to grant a petition for writ of certiorari in the *Smith* case and there is nothing that distinguishes this case from *Smith*, either factually or legally, that would warrant a different result here.

2. The Seventh Circuit's View.

Similarly, in *Klein v. Ryan*, 847 F.2d 368 (7th Cir. 1988), a business owner complained to police that someone was stealing money from his laundromat. The police determined that William Klein ("Klein") was responsible for the thefts and placed the laundromat under surveillance. The officers then observed Klein taking money from the laundromat. As Klein left the laundromat with the stolen money, Officer Lawrence Ryan ("Ryan"), who—like Lowery—was dressed in plain clothes, identified himself as a police officer and told Klein to stop. Klein dropped the money, ran to his car, and attempted to escape. As Klein drove away, another officer, Frank Lombardo ("Lombardo"), who was standing behind Klein's car, shot at Klein's car in self-defense, believing that Klein was attempting to run him over. Ryan also shot at the car, although neither officer's shots stopped Klein from fleeing. The police subsequently arrested Klein at a local hospital when he sought medical treatment for an injury he sustained, apparently from one of Lombardo's shotgun blasts. Klein then sued Ryan and Lombardo under 42 U.S.C. section 1983 for use of excessive force under the Fourth Amendment. *Id.* at 369-71.

The Seventh Circuit affirmed summary judgment in favor of the police officers on the ground of qualified immunity because the officers did not violate clearly established law at the time. *Id.* at 375. This pre-*Graham v. Connor* decision is significant because Klein was unarmed and claimed that he did not hear Ryan identify himself as a police officer. Even accepting Klein's statements as true, the court still concluded that the officers' use of deadly

force was reasonable in light of clearly established law at the time. *Id.* at 375.

Therefore, the Court should also deny the Petition because the Fifth Circuit's decision below is consistent both with its other decisions[11] and with those of the Sixth and Seventh Circuits based upon similar facts. None of the cases Petitioners cite require or even suggest a contrary result.

II.

Any Alleged Conflict That Exists Among the Circuits Is Resolved by *Siegert v. Gilley* and *Hunter v. Bryant*.

Petitioners next ask the Court to grant certiorari because the lower courts are allegedly unclear as to what standard to apply when resolving the issue of qualified immunity in the context of an excessive-force claim. However, for the reasons stated immediately above, this confusion appears to exist more with the Petitioners than it does in the case law. Moreover, to the extent any such confusion did exist, it has been resolved by this Court's recent decisions in *Siegert v. Gilley*, ___ U.S. ___, 111 S. Ct. 1789 (1991), and *Hunter v. Bryant*, ___ U.S. ___, 112 S. Ct. 534 (1991), both of which decisions Petitioners ignore.

---

[11] *See Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), and *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985), both of which involved facts similar to those in this case.

A. The Analysis in *Siegert*--Whether a Constitutionally Protected Right Exists.

Last year, the Court in *Siegert* held that in the context of a claim for qualified immunity, the initial inquiry is whether a constitutionally protected right even exists. If no such right exists, *Siegert* holds that a court need not even reach the issue of qualified immunity. 111 S. Ct. at 1793-94. Accordingly, the Court in *Siegert* declined to reach the question of qualified immunity, having previously concluded that the plaintiff's claim did not rise to the level of constitutionally protected or recognized right. *Id.* at 1793-94.

B. The Analysis Under *Hunter*—Whether the Officer's Actions Were Reasonable in Light of Clearly Established Law at the Time.

If a constitutionally protected right exists, *Hunter v. Bryant* requires that a court next decide the legal question of whether a defendant may prevail on a qualified-immunity defense. In *Hunter*, the Court reaffirmed that a police officer, such as Lowery, may rely upon the defense of qualified immunity if a reasonable officer could have believed his actions to be lawful in light of clearly established law and the information the officer possessed. 112 S. Ct. at 536. Additionally, the Court reiterated that qualified immunity is more than a defense to liability, it is "*immunity from suit*," and its applicability must be resolved at the earliest possible phase of the litigation. *Id.* (emphasis in original). If qualified immunity is not applicable under the circumstances or may not be resolved by motion practice because of factual disputes, the court

should then determine whether a constitutional violation has occurred.

C. The Qualified Immunity Analysis—As Applied to Excessive-Force Claims.

Accordingly, in the context of an excessive-force claim, *Siegert* first requires a court to determine whether a constitutionally protected right exists, which it obviously does under the Fourth Amendment. *Hunter* then requires a court to determine whether qualified immunity applies by asking "whether the [officer] acted reasonably under well settled law in the circumstances." 112 S. Ct. at 537. The qualified-immunity inquiry thus entails a two-step analysis: (1) whether the officer acted reasonably under the circumstances, (2) in light of clearly settled law *at the time*. Here, consistent with *Hunter*, the Fifth Circuit correctly examined the reasonableness of Lowery's actions in light of its prior holding in *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. Unit A Jan. 1981), which represented the state of the law that existed in November 1987 in the Fifth Circuit regarding excessive force.

Therefore, any alleged confusion among the circuits regarding what standard to apply (which Lowery does not concede exists) is necessarily resolved by the holding in *Hunter*. Courts must examine the state of the law *at the time of the incident* to determine whether it was clearly established and whether the officer's actions were reasonable in light thereof.[12] Petitioners have not cited a

---

[12] If a court then determines that qualified immunity does not apply at an initial stage of the litigation, either because a

single case in which a court has strayed from this analysis, and the Court should therefore also deny the Petition in light of *Hunter*.

III.

The Court Should Not Destroy the Defense of Qualified Immunity for Law Enforcement Officers.

Notwithstanding *Hunter*, Petitioners also contend that the Court should grant their Petition because (1) "the rationales underlying qualified immunity for public officials are not applicable to law enforcement officers, . . ." and (2) the reasonableness standard for qualified immunity in excessive-force cases under the Fourth Amendment is exactly the same as that enunciated in *Graham*. (Petition at 30-33.) Specifically, Petitioners argue that the Court should extend its very limited and narrow holding in *Wyatt v. Cole*, ___ U.S. ___, 112 S. Ct. 1827 (1992) (declining to extend qualified immunity to private citizens) to abolish the qualified-immunity defense for law enforcement officers. For the following reasons, the Court should decline the invitation.

First, for the Court to adopt Petitioners' view, it would necessarily be required to overrule *Hunter* and over twenty years of qualified-immunity jurisprudence. The Court has repeatedly held that qualified immunity is

---

material fact question exists under FED. R. CIV. P. 56, or because the officer's actions were not reasonable in light of clearly established law at the time, the officer's actions should then either be reexamined once all material factual disputes have been resolved or analyzed under the excessive-force test announced in *Graham*.

not only a defense to liability, it is "an *immunity from suit*" and therefore must be resolved at the earliest possible moment in the litigation to avoid the very expense that Petitioners now seek to force upon police officers such as Lowery. *Hunter v. Bryant*, 112 S. Ct. at 536. However, Petitioners' view ignores these holdings and would subject police officers to all the trappings of civil litigation—such as protracted discovery—from which they are otherwise shielded under the qualified-immunity defense. Petitioners would also deprive police officers of their right to an interlocutory appeal regarding qualified immunity as permitted under *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Indeed, one need only read the detailed policy discussion regarding qualified immunity in *Wyatt* to conclude that Petitioners' suggestion of abolishing that defense is absurd. 112 S. Ct. at 1831-33 ("[W]e have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damage suits from entering public service."). *Accord Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) ("[Q]ualified immunity affords government officials greater protection than a simple defense on the merits. [T]he purpose of qualified immunity is to remove most civil actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury."). Petitioners have offered no persuasive authority or policy reason that would justify such a drastic change in the law.

Second, and even accepting Petitioners' argument that the "reasonableness" element of the qualified-immunity defense involves inquiries similar to those of the "reasonableness" element of an excessive-force claim, the Court should still not abolish the qualified-immunity defense for police officers, as to do so would cause all police officers to hesitate to make the very type of split-second decisions that Lowery was forced to make in this case to save his life. *See Gooden v. Howard County, Maryland*, 954 F.2d 960, 964 (4th Cir. 1992) (holding that the purpose of qualified immunity is to afford "police officers latitude in exercising what are inescapably discretionary functions replete with close judgment calls."). In fact, had Lowery not shot Fraire when he did, it is likely that he would have either been severely injured or killed, or that he and the City would now be defending themselves in a suit brought by the survivors of one of the innocent bystanders whom Fraire killed in his desperate attempt to flee the neighborhood to avoid the law.

IV.

The Court Should Deny the Petition Because Petitioners Did Not Present or Argue the Issue of Qualified Immunity Before the Fifth Circuit and Have Therefore Waived Their Right to Challenge That Point on Appeal.

Although Petitioners now ask this Court to resolve the issue of whether qualified immunity is a viable defense to an excessive-force claim, Petitioners failed to even address the issue of Lowery's qualified immunity--let alone whether that defense is applicable in the context of a Fourth Amendment excessive-force claim--in their brief before the Fifth Circuit. Instead, Petitioners focused

solely upon whether Lowery's actions constituted the use of excessive force as defined by the Court under *Graham v. Connor*. Therefore, Petitioners cannot now be heard to complain that the Fifth Circuit erred in applying that defense or in ruling as it did. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n.5 (1989).

V.

The Court Should Deny the Petition Because Lowery Acted in Self-Defense and Therefore Did Not Use Excessive Force Under the Fourth Amendment.

Finally, and independent of all the foregoing, the Court should deny the Petition because Lowery did not use excessive force as a matter of law. Although Petitioners struggle in vain to "pigeonhole" this case into that portion of *Tennessee v. Garner*, 471 U.S. 1 (1985), which precludes the use of deadly force to stop a non-dangerous fleeing suspect, as the district court correctly noted, "[t]his case is not so simple." (R. Vol. II, pp. 537-38.)

To succeed on an excessive-force claim under the Fourth Amendment, Petitioners must prove all of the following elements:

(1) a significant injury;

(2) which resulted directly and only from the use of force that was clearly excessive to the need; and

(3) the excessiveness of which was objectively unreasonable.

Graham v. Connor, 490 U.S. 386 (1989).

This analysis necessarily involves an inquiry into when and how the seizure occurred, coupled with a balancing of the intrusion upon the individual's rights against the countervailing governmental interests. *Id.* at 396. Additionally, one must consider that Fraire posed an immediate threat to the safety of Lowery and others and was either resisting arrest or avoiding it by flight. *Id.* Finally, whether Lowery's use of force was objectively reasonable must be determined in light of the facts and circumstances presented to him at the time and not with the benefit of 20/20 hindsight as "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97. With these standards in mind, the following analysis shows that Lowery did not violate Fraire's Fourth Amendment rights.

First, when Lowery first observed Fraire and Rodriguez, they were drinking and driving on Collins Road, which even Petitioners concede was in violation of Texas law. Fraire was also driving erratically. Thereafter, Fraire turned onto Woodbrook Street and pulled into the first driveway in an attempt to trick Lowery. When this ploy failed, Fraire backed out of the driveway and sped down Woodbrook Street into the heart of a residential neighborhood. In his attempt to flee from Lowery, Fraire then crashed his truck several feet on to a neighbor's lawn and commanded Rodriguez to throw the beer out the window. Fraire then backed up off the lawn, nearly ramming Lowery's car. Seconds later, Fraire sped away—

again trying to flee from Lowery—and turned into Creekmere Court, which Fraire obviously did not realize was a cul-de-sac. Fraire then turned the truck around and headed out of the cul-de-sac. With Lowery now on foot and repeatedly yelling "Police, Stop!" Fraire drove straight at Lowery, showing no sign of either attempting to stop or drive around Lowery. When it became imminently clear to Lowery (as it was to the other eyewitnesses) that Fraire was going to run him down, Lowery fired a single shot at Fraire in self-defense at the last possible moment.[13]

Under these circumstances, *Tennessee v. Garner*, 471 U.S. 1 (1985), confirms that Lowery did not use excessive force under the circumstances:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon- . . . deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. at 11-12.

Here, Lowery clearly had probable cause to believe that Fraire posed a serious threat of physical harm to Lowery (and others) because Fraire unquestionably threatened Lowery a with a deadly weapon—his truck. *See* TEX. PENAL CODE ANN. § 1.07(a)(11)(B) (Vernon 1974)

---

[13] Lowery does not challenge that Fraire's injury was "severe" under *Graham v. Connor*.

(defining a "deadly weapon" as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury"); *Parrish v. State*, 647 S.W.2d 8, 10 (Tex. App.—Houston [14th Dist.] 1982, no writ) (holding that "it is well known that an automobile is capable of producing death or serious bodily injury"). *Accord Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992); *United States v. Sanchez*, 914 F.2d 1355 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1626 (1991). Lowery also gave repeated instructions for Fraire to stop, which Fraire simply ignored. Had Lowery not fired when he did, Lowery would have undoubtedly died or suffered severe and permanent bodily injury.

Second, Lowery's use of force cannot be viewed as grossly disproportionate under the circumstances because he acted well within the scope of section 9.51(c) of the Texas Penal Code, which governs a police officer's use of deadly force in Texas. TEX. PENAL CODE ANN. § 9.51(c) (Vernon 1974). This statute provides in pertinent part that:

> A peace officer is justified in using deadly force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest, if the use of force would have been justified under Subsection (a) of this section and:
>
> * * *
>
> (2) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed.

Section 9.51(a) of the Texas Penal Code provides that the use of force is justified if (1) the police officer reasonably believes the arrest is lawful, and (2) before using force, the officer manifests his purpose to make an arrest and identifies himself as a police officer, if possible or necessary. *Id.* § 9.51(a). Lowery satisfied the requirements of both subsections 9.51(a) and (c) because he observed Fraire drinking and driving and therefore had probable cause to stop and arrest Fraire. Lowery also had more than a reasonable basis to believe that Fraire might cause death or serious bodily injury to himself or others based upon Fraire's flight into a residential neighborhood at a high speed and subsequent repeated attempts to hit Lowery with his truck.

Finally, as discussed above, the amount of force Lowery used was neither excessive nor unreasonable in light of the holdings in *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), *Klein v. Ryan*, 847 F.2d 368 (7th Cir. 1988), and *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985), wherein the courts rejected section 1983 claims for excessive force under circumstances less threatening to the officers than those here.

Therefore, the Court should deny the Petition because, even under *Graham v. Connor*, Lowery did not violate the Fourth Amendment when he was forced to shoot Fraire to save his own life and preserve the safety of bystanders.

CONCLUSION

For any of the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

GARY D. EISENSTAT

Counsel of Record
for Respondent
James W. Lowery, Jr.

4800 NationsBank Plaza
901 Main Street
Dallas, TX 75202
(214) 939-2000

Of Counsel:

FIGARI & DAVENPORT, L.L.P.

ERNEST E. FIGARI, JR.
4800 NationsBank Plaza
901 Main Street
Dallas, TX 75202